85-1122

Supreme Court, U.S.
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In the Supreme Court of the United States

October Term, 1985

No. _____

KENNETH W. BEHREND and
BEHREND, ARONSON and MORROW,

Petitioners

vs.

ALTON GODWIN and KAREN GODWIN,
and VICTOR SCHRAMM, UNITED
STATES OF AMERICA,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RIEDERS, TRAVIS, MUSSINA,
HUMPHREY & HARRIS

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1401-P

The Petitioner, Kenneth W. Behrend and Behrend, Aronson and Morrow, respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this proceeding on September 26, 1985.

QUESTION PRESENTED

Can a trial judge, without affording any notice or hearing, use the inherent powers of the Court to impose a large monetary sanction against an attorney in the form of an injunction which contemplates future action and then wholly deny the attorney due process when he seeks to have a hearing under the terms of the injunction?

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OPINIONS BELOW

The opinion of the U. S. Court of Appeals for the Third Circuit dated September 26, 1985 (App. A, infra 1a-12a) is not reported. The judgment order of the United States District Court for the Western District of Pennsylvania dated December 7, 1984, denying petitioner's Rule 60(b) motion (App. B, infra, 13a-15a), is not reported. The opinion of the U. S. Court of Appeals for the Third Circuit dated March 30, 1984 is reported at 731 F.2d 153 (3d.Cir. 1984) (App. C, infra. 16a-62a). The opinion and order of the United States District Court for the Western District of Pennsylvania dated January 18, 1982, (App. D, E, infra., 63a-91a) is not officially reported.

JURISDICTION

Original jurisdiction of this matter in the U. S. District Court was based on 28 U.S.C., §1346(a)(b); 2671, 2672, 2677 and 2678.

On December 7, 1984 the District Court denied petitioner's Rule 60(b) motion for relief under the Federal Rules of Civil Procedure. The petitioner then filed an appeal to the Third Circuit in accordance with 28 U.S.C., §1291 and on September 26, 1985 the Third Circuit Court of Appeals issued an opinion upholding the District Court's denial of petitioner's Rule 60(b) motion. No petition for rehearing was filed with regard to the September 26, 1985 Opinion of the Third Circuit. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).K

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part "No person shall... be deprived of life, liberty, or property without due process of law; ...."

STATUTES INVOLVED

This case generally involves United States Code - Title 28,

Section 2677 Compromise

> The Attorney General or his designee may arbitrate, compromise, or settle any claim cognizable under section 1346(b) of this title, after the commencement of an action thereon.
>
> (As amended July 18, 1966, Pub.L. 89-506, Sec. 3, 80 Stat. 307.)

Section 2678 Attorney Fees; Penalty

> No attorney shall charge, demand, receive, or collect for services rendered, fees in excess of 25 per centum of any judgment rendered pursuant to section 2346(b) of this title or any settlement made pursuant to section 2667 of this title,

or in excess of 20 per centum of any award, compromise, or settlement made pursuant to section 2672 of this title.

Any attorney who charges, demands, receives, or collects for services rendered in connection with such claim any amount in excess of that allowed under this section, if recovery be had, shall be fined not more than $2,000 or imprisoned not more than one year, or both.

(As amended July 18, 1966, Pub.L. 89-506, Sec. 4, 80 Stat. 307.)

Federal Rule of Civil Procedure - Rule 60(b) - Mistakes; Inadvertence; Excusable Neglect; Newly Disocvered Evidence; Fraud, Etc.

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other

misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwiise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does no affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., §1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by a motion as prescribed

in these rules or by an independent action.

STATEMENT OF THE CASE

The present Petition is from an affirmance by the Third Circuit Court of Appeals of a District Court's Order denying the Petitioner's, Mr. Behrend's, Rule 60(b) Motion to Modify an Injunction entered against him by the District Court.

The underlying case involved a medical malpractice action in which Mr. Behrend represented a Mr. Godwin. Mr. Godwin had suffered serious permanent injuries from an operation performed upon him in a Veteran's Administration related hospital. During the surgery which was performed to remove growths from Mr. Godwin's vocal cords, a laser beam ignited oxygen being administered through a tube in Godwin's throat. At the time of the injury, Godwin, a

military service veteran was disabled from an industrial injury. Mr. Behrend filed the initial action in Pennsylvania State Court against the supplier of an appliance used in the operation and named as Defendants, the operating physicians. During the process of pretrial discovery, the United States was substituted as a Defendant and the case was removed to The U. S. District Court on May 27, 1981 with federal jurisdiction invoked under the Federal Tort Claims Act. With several additional Defendants added and extensive discovery being required, the case assumed protracted proportion consuming approximately 20 months of extensive discovery. In September, 1982, when the third party actions were scheduled for separate trial, and the primary action of Godwin vs. The United States was poised

for trial, the parties intensified their settlement negotiations. As part of this preparation for the case, Mr. Behrend expended over $60,000.00 in costs and expenses. Over the recommendation of their counsel, Mr. Behrend, the Godwins agreed to settle the case on December 13, 1983. The settlement included a cash payment to the Godwins in the amount of $1,125,000.00 and the Veteran's Administration was to continue to provide medical care to Mr. Godwin for the rest of his life. Judge Zeigler, the presiding District Court Judge, awarded Mr. Behrend attorney's fees of $281,250.00 which was 25 percent of the $1,125,000.00 award. Mr. Behrend then filed a Motion for Costs on behalf of the Godwins, wherein Mr. Behrend attempted to have the expenses incurred

on behalf of the Godwins treated as record costs; a Motion for reconsideration of the amount of attorney's fees; and a Motion on behalf of the Godwins against the United States for indemnification by the United States for costs and expenses to the extent any costs and expenses were not allowed to the Godwins under their Motion for record costs. The United States Government subsequently filed a Motion to Confirm the Settlement. At no point did Mr. Behrend bring a motion requesting the Court to order the Godwins to pay the expenses his firm incurred on their behalf.

On January 18, 1983, the District Court issued an Order disposing of the above listed Motions in which the District Court granted the United States' Motion to confirm the settlement and denied Mr. Behrend's

Motion for reconsideration of the amount of attorney's fees and Mr. Behrend's Motions on behalf of the Godwins to either have the expenses incurred treated as record costs or to have the United States Indemnify the Godwins for their costs and expenses. While there was no motion by Mr. Behrend requesting that the Godwins pay the expenses to his firm incurred on their behalf, the District Court also entered an Order enjoining Mr. Behrend or his firm from seeking the expenses they had incurred on behalf of the Godwins. The Court's injunctive Order read as follows:

> It is further ordered that Kenneth W. Behrend and the law firm of Behrend, Aronson and Morrow shall be and hereby are ordered to refrain from pressing any claim or demand in any court against plaintiffs for any fee, expense or cost unless otherwise authorized by the Court.

An appeal was taken to the Third Circuit on that portion of the Order denying reconsideration of the fee as well as that portion of the Order denying the motions on behalf of the Godwins to have the United States pay the costs and expenses of the litigation. The Third Circuit Court of Appeals affirmed the District Court on all the issues raised on appeal. With regard to the issue of costs and expenses the Third Circuit noted:

> Behrend filed a Petition on behalf of the Godwins, not one on behalf of himself, seeking recovery from the Godwins. It was the Petition on behalf of the Godwins the District Court denied and which is the subject of this appeal.

Mr. Behrend did not appeal the injunction entered by the District Court. Mr. Behrend then filed a Petition for Certiorari with this Court raising the issue of the fee

computation and the denial of assessment of costs against the United States Government. Mr. Behrend's Petition for Certiorari was denied. Mr. Behrend then filed a Rule 60(b) Motion seeking to have the January 18, 1983, injunction of the District Court modified. On December 7, 1984, the District Court denied Mr. Behrend's Rule 60(b) Motion as being a collateral attack upon its judgment of January 18, 1983 stating in part:

> WHEREAS, the Court of Appeals affirmed this Court's denial of costs and expenses, and affirmed this Court's award of counsel's fee, and also affirmed the injunctive relief ordered by this Court; . . .
>
> IT IS ORDERED that the Motion of Kenneth W. Behrend, and Behrend, Aronson and Morrow for relief under Rule 60(b)(6) be and hereby is denied.

The District Court held no hearing prior to entry of its Order denying Mr. Behrend's Motion.

Mr. Behrend appealed the denial of his Rule 60(b) Motion to the Third Circuit Court of Appeals. On September 26, 1985, the Third Circuit, without hearing any argument, affirmed the judgment of the District Court and awarded double costs against Mr. Behrend.

To this date, Mr. Behrend has never received a hearing concerning the summary injunction ordered against him, which injunction has prevented him from recovering over $60,000.00 of out of pocket costs and expenses. No Court or party has ever questioned the amount or legitimacy of the expenses Mr. Behrend incurred on behalf of his client.

REASONS FOR GRANTING THE PETITION

The decision of the Court of Appeals - holding that an attorney may not bring a Rule 60(b) Motion to have a hearing on an injunction which by its terms

contemplates future action and which absent such future hearing has the effect of wholly denying the attorney any due process rights - is in direct conflict with this Court's holdings in System Federation No. 91, Ry. Enp. Dept. vs. Wright, 364 U.S. 642, 81 S.Ct. 368 (1961), and United States vs. Swift and Co., 286 U.S. 106 (1932), concerning injunctions which by their terms contemplate future action, and Roadway Express, Inc. vs. Piper, 444 U.S. 752 100 S.Ct. 2455 (1980), and Bradley vs. Fisher, 80 U.S. (13 Wall.) 335 (1871), which cases held that attorneys must be afforded some due process guarantees before imposition of sanctions by a court.

In view of the expansion of summary assessment of fines against attorneys, outside of statutory authority, Eash vs. Riggins Trucking Inc., 757 F.2d 557

(3d.Cir. 1985); Kleiner vs. First Nat. Bank of Atlanta, 751 F.2d 1193 (11th.Cir. 1985); Matter of Sanction of Baker, 744 F.2d 1438 (10th.Cir. 1984); Miranda vs. Southern Pacific Transp. Co., 710 F.2d 516 (9th.Cir. 1983); Chesa Int'l, Ltd. vs. Fashion Assocs., Inc., 425 F.Supp. 234 (S.D.N.Y.), aff'd Mem., 573 F.2d 1288 (2d.Cir. 1977); United States vs. Martinez, 385 F.Supp. 323, (W.D.Tex. 1974), aff'd. Mem., 522 F.2d 1279 (5th.Cir.), cert. denied, 425 U.S. 906 (1975), it is extremely important for trial judges to know what, if any limits, exist with regard to their inherent power summarily to sanction attorneys.

The power of the federal courts summarily to penalize attorneys for improper conduct has long been limited in recognition both of the proper role

of congress in regulating procedure and establishing punishment and the principals of procedural due process imbedded in our constitution. Cooke vs. United States, 267 U.S. 517, 537, 45 S.Ct. 390, 395 (1925). These requirements of procedural due process have long required that in the absence of an extraordinary public or private interest requiring special protection, an individual, including an attorney, should be afforded notice and an opportunity for a timely hearing before any deprivation of property by adjudication. Boddie vs. Connecticut, 401 U.S. 371, 379, 91 S.Ct. 780, 786 (1971); Mullane vs. Central Hanover Bank and Trust Co., 339 U.S. 306, 313, 70 S.Ct. 652 (1950). Further, the application of the principals involved in due process is determined not by which branch of government is pursuing

the action but by whether property is being taken. Board of Regents of State Colleges vs. Roth, 408 U.S. 564, 569-70, 92 S.Ct. 2701 (1972); In Re Oliver, 333 U.S. 257, 274 68 S.Ct. 499, 508 (1948). While the type of due process required may be determined by the special circumstances involved, special circumstances do not permit the taking of property where an individual has totally been denied due process. Nonetheless, courts have been increasingly willing to impose financial penalties against attorneys who have neither been found guilty of direct contempt nor have been given a notice and hearing. Chesa Int'l, Ltd. vs. Fashion Assocs., Inc., supra. (attorney was ordered jointly and severally liable with his client for $2,885 in expenses and attorney's fees for failure to submit to discovery.);

United States vs. Martinez, supra. (the attorney was ordered to represent the client on appeal and to pay the costs of the appeal because the Court felt that he had overcharged his client.) Such actions by the courts are in derogation of the carefully proscribed powers of contempt and fail to comport with even minimal due process requirements. Whether the penalty takes the form of an injunction or a direct fine has no effect on whether an individual has in fact been deprived of property without due process. Further, whether authority to enter the sanction depriving the attorney of his property is invoked under the inherent power of the court to supervise attorneys practicing before it, under the All Writs Act or under any other inherent or statutory power does not alter the fact that the

constitution requires some form of due process. It is the deprivation of property without due process, not what power is invoked to cause such deprivation, which is unconstitutional. Because of the increasing use of summary assessment by the federal courts, it is important for the Court, before the use of improper procedures becomes entrenched, to give guidance to the lower Federal Courts as to what process, even if minimal, must be afforded attorneys. A brief look at the facts involved in the present case points out what can happen when there is no direction or bounds placed upon the summary assessment powers of the Federal Courts. On January 18, 1983, the District Court, Judge Ziegler, issued an Order disposing of the following pending Motions.

1. The Motion by the United States to confirm the settlement.

2. A Motion for costs on behalf of the Godwins wherein Mr. Behrend attempted to have the expenses incurred on behalf of the Godwins treated as record costs.

3. A Motion by Mr. Behrend for reconsideration of the amount of attorneys fees.

4. The District Court did not allow the Godwins' expenses to be treated as record costs, Mr. Behrend brought a Motion on behalf of the Godwins against the United States for indemnification by the United States for costs and expenses which were not included by the court in the Motion described in number two above.

The important fact to note is that the District Court did not have before it a Motion by Mr. Behrend requesting that the Godwins pay the expenses the firm incurred on their behalf. No such

Motion was before the District Court because there was no basis for bringing such a Motion. The District Court neither had before it nor should have had before it the obligation of Mr. Behrend to seek recovery of costs from his clients. When an attorney seeks to recover expenses he has incurred on behalf of his client, he first seeks through a court order to have the party he is suing bear the burden of these expenses. This is precisely what Mr. Behrend did in two separate Motions on behalf of his clients. These Motions were based upon the court's power to award cost to the prevailing party and its assumed power under 28 U.S.C. Section 2677 to approve settlements. While the Court did have power to entertain these Motions, the court has no power under 28 U.S.C. Section 2678 of the Federal Torts Claim Act or any

other statutory provision with regard to a bill for expenses incurred on behalf of the client. It would have been improper to bring such a Motion and outside the court's jurisdiction to decide such a Motion if it had been brought. If, as occurred in this case, the court refuses to assess these expenses against the losing party, the attorney must then seek to recover these expenses from his client. Further, not only is an attorney entitled to recover for expenses he incurs on behalf of his clients, but Disciplinary Rule 5-103 and Ethical Consideration 5-8 require attorneys to hold their client ultimately liable for such expenses. See, Chevalier vs. Baird Sav. As'n. 72 F.R.D. 140, 147 (E.D.Pa. 1976). However, when an attorney seeks to recover the expenses from his client, he does not do so by

Motion to the court. Instead, in keeping with the Disciplinary Rule 5-103, the attorney directly presents a bill for expenses to the client. If payment of this bill were refused, the attorney would then bring a separate action based upon contract or quantum meruit for recovery of these expenses. This is precisely the method which Mr. Behrend intended to and did follow until the court entered its Order of January 18, 1983 enjoining Mr. Behrend from pursuing his obligation to recover these expenses from his client. The Court's Order stated in relevant part:

> It is further ordered that Kenneth W. Behrend and the law firm of Behrend, Aronson and Morrow shall be and hereby are ordered to refrain from pressing any claim or demand in any court against plaintiffs for any fee, expense or cost unless otherwise authorized by the court.

This injunction had nothing to do with nor could it have anything to do with

the amount or legitimacy of the expenses incurred on behalf of the Godwins. Further, this Order had nothing to do with nor could it have anything to do with whether Mr. Behrend was entitled on the basis of quantum meruit to recover the legitimate expenses he had incurred over almost two years of trial preparation. If a contractor purchased $60,000 of materials and constructed a building for a client, the fact that his contract was later found to be invalid would not prevent him from recovering the costs of his materials. The contractor would, just as an attorney, be allowed to recover for the expenses legitimately incurred which benefitted his client. This fact is so basic to the law that it needs no further discussion. The only basis for the District Court's injunction was the

imposition of a sanction against Mr. Behrend and his law firm for what the District Court argued was a violation of the Code of Professional Responsibility.

In light of this legal and factual background, there were two ways for Mr. Behrend to view the District Court's Order. First, Mr. Behrend could find that the "Unless otherwise authorized" language of the Order had no meaning and was merely excess verbiage and the court wished to totally ignore Mr. Behrend's due process rights and did not contemplate any hearing on this issue. Second, that the "Unless otherwise authorized" language had meaning and contemplated further action which would accord Mr. Behrend his due process rights to be heard on the court's severe sanction, an approach which would be similar to the process

employed by the Courts of Appeals under Federal Rule of Appellate Procedure 46(c). While Mr. Behrend was evidently wrong in feeling that there was a purpose to the court's language and that the court had no intention of completely violating his due process rights, his interpretation was certainly the most logical, if not the only logical, reading of the court's injunction, and comports with the procedure used by the Federal Courts of Appeals.

This case points out what can happen when there is no direction or bounds placed upon the summary assessment powers of the federal courts. There can be little question that the only basis for denying Mr. Behrend his expenses incurred directly on behalf of the Godwins is the inherent power of the court to sanction attorneys. There

also can be little question that the authority was exercised without affording Mr. Behrend any due process. There also can be little question that the District Court perceived that it had the right to informally enter such sanctions as it deemed appropriate. Because of the informal nature of these sanctions, there are absolutely no procedural guidelines for an attorney to follow and no point, prior to the entry of the sanction, at which the attorney has any idea that his property rights are at issue before the court. Therefore, unless the attorney is afforded some later hearing, as the injunction seems to contemplate and as is done under Fed. R.App.P. 46(c), he will have been deprived of his property without any due process of law. Such a deprivation of an attorney's due process rights runs counter to the

holdings of this court as well as to the general recognition under federal law that even an attorney is entitled to some due process.

In Ex Parte Bradley, supra., an attorney appeared before a lower court to defend his rights with regard to his alleged misconduct. While so appearing, the attorney was punished for conduct which he had not been given notice of. This Court held that a court may not punish an attorney, even though he is before the court in proceedings to determine his personal rights, for conduct other than that for which he was brought before the court. Yet, in the present case Mr. Behrend was before the court on behalf of his client and without any notice or hearing that his personal rights were even involved and had an enormous monetary sanction imposed against him

through the vehicle of what has become an unreviewable prospective injunction.

Under 28 U.S.C. Section 1927, an attorney may be required to personally satisfy excess costs, expenses and attorney's fees reasonably incurred because of his unreasonable and vexatious conduct. Under Section 1927 specific conduct has been proscribed and the sanctions have been limited to expenses reasonably incurred because of this conduct. Even within these specific guidelines, it has been repeatedly held that a court must provide counsel with some opportunity to be heard before entering a sanction. Roadway Express, Inc. vs Piper, 447 U.S. 742, 767, 100 S.Ct. 2455, 2465 (1980); Knorr Brake Corp. vs. Harbil, Inc., 738 F.2d 223, 227 (7th Cir. 1984); United States vs. Blodgett, 709 F.2d 608 (9th Cir. 1983).

Under the power of courts to punish parties appearing before them for contempt, this Court has carefully circumscribed the judge's ability to impose a punishment without affording due process of law. In In Re Oliver , 333 U.S. 257, 68 S.Ct. 499 (1948), this Court stated with regard to the use of such summary punishment:

> However, this Court recognizes that such departure from the accepted standards of due process was capable of grave abuses, and for that reason gave no encouragement to its expansion beyond the supression and punishment of the court disrupting misconduct which alone justified its exercise.

Id. at 274, at 508. In other words, not only must even the imposition of such summary punishment be sparingly used but such punishment must be closely related to the specific misconduct involved.

Under 28 U.S.C. Section 2678, the section which specifically deals with the alleged violation involved, specific penalities are prescribed for an attorney who has been found to have violated the section. The limit of the fine which may be imposed is $2,000.00, a limit which has been specifically legislated by the Congress.

Under the above statutes and case law, an attorney, even when specifically advised by statute of the grounds for finding misconduct, must be afforded due process. Further, to the extent punitive action is warranted, the punishment must specifically be related to and monetarily limited by either the cost of the specific misconduct or legislatively imposed maximum fine.

Utilizing the inherent powers of the court, as exercised in this case, the

District Court has without any notice or hearing imposed a sanction of $60,000.00; a sanction which is wholly unrelated to anything other than the court's desire to penalize the attorney. The District Court imposed this fine despite the fact that there is a $2,000.00 statutory limit, 28 U.S.C. Section 2678, and despite the fact that the costs and expenses legitimately incurred by the attorney bear absolutely no relation to the alleged misconduct. According to such a theory of inherent power, the court could just as well have enjoined Mr. Behrend, without any notice or hearing, from collecting any fee as well as expenses even though such a sanction would be, just as the sanction imposed, unrelated to the alleged wrong and in direct derogation of the legislatively limited authority of the court under

Section 28 U.S.C. Section 2677 and 2678. It is impossible in a due process context to rationally arrive at the divergent results which occur depending upon whether the court chooses to follow statutory procedures, 28 U.S. Section 2678, or its inherent power. On the one hand is the carefully prescribed statutory power of the court to punish an attorney for a specific offense and on the other is the unfettered discretion to punish without guidelines and without monetary limit or relationship of the amount of the sanction to any fact or event. Such unbridled power obviously was not intended to be encompassed within the inherent power of the court. Further, the use of such unbridled power seriously calls into question the separation of powers embodied in our

Constitution. As James Madison noted in the Federalist Papers:

> Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor.

The Federalist No. 47, at 338 (B.Wright Ed. 1961). There is no statutory authority which allows the trial judge, when confirming a settlement under the Federal Tort Claims Act, to sua sponte consider the liability of a client for expenses incurred on the client's behalf by his attorney. There is also no statutory authority under the Federal Tort Claims Act which allows a Court summarily to assess an arbitrarily selected fine against an attorney who has allegedly attempted to charge more than a 25 percent contingent fee. 28 U.S.C.

§2678. Yet, the Court in the present case, feeling that the attorney had attempted to charge an improper fee, ignored all statutory restraints upon his authority and under the Court's inherent powers fined an attorney $60,000 without any notice of hearing. By so doing, the District Court legislatively determined that it could under the Federal Torts Claim Act inquire into the agreement for expenses. The District Court also legislatively determined that it could impose whatever fine it deemed appropriate and then executively determined that it could enforce its sanction not through a fine or legal proceeding but through a prospective injunction. There is absolutely nothing which does or should support such a broad assumption of power by the District Court. If the Court fails to

set forth guidelines for the expanding area of summary sanctions, there is nothing which would prevent such an abuse of the judicial system.

Whether the District Court's injunction is properly challenged through Rule 60(b) and under this Court's holdings in System Federation No. 91 Ry. Emp. Dept. vs. Wright, supra. and United States vs. Swift and Co., supra., as contemplating future action or whether the District Court's injunction is challenged through Rule 60(b)(6) as not comporting with the ends of justice, there is no question that the power exercised by the District Court judge in the present case should not go unreviewed. Whatever may be the correct view of the law with regard to affording attorneys due process when the Court seeks to

impose a summary assessment, we submit that the issue is of substantial importance to the administration of the Federal Judicial System and that this Court should undertake the task of setting forth appropriate guidelines and bounds for the exercise of this inherent power of the Court.

Serious harm is done to our adversary system when attorneys, who sharply conflict with a judge over the meaning of the law, are subjected to the unfettered power of the judge to summarily punish the attorney. The facts of this case demonstrate what can and will happen if courts are left without any guidelines or procedural restraints upon their power to impose summary assessments. The Petitioner therefore respectfully requests this court to grant his Petition for Certiorari so that this court may

provide the lower Federal Courts with some guidelines and instructions as to the use of their summary assessment power and to thereby avoid the excesses and abuses which can and do occur when such power is left unchecked.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Third Circuit.

Respectfully submitted,

RIEDERS, TRAVIS, MUSSINA,
HUMPHREY & HARRIS

s/ C. Rieders

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 85-3008

ALTON GODWIN and KAREN GODWIN, his wife

vs.

VICTOR SCHRAMM

UNITED STATES OF AMERICA

vs.

EYE AND EAR HOSPITAL, DALE McMURDO
FRANK KAISER and HOWARD F. ARMOUR

CHILDREN'S HOSPITAL OF PITTSBURGH,
CLAIR I. ELLIS, AND SYLVAN E. STOOL

Kenneth W. Behrend and Behrend,
Aronson and Morrow, Appellants

Appeal From the United States District Court
For the Western District of Pennsylvania
(Pittsburgh)
D.C. Civil No. 81-856
District Judge: Donald E. Ziegler

Submitted Under Third Circuit Rule 12(6)
September 10, 1985

Before: HUNTER, GARTH, and HIGGINBOTHAM,
Circuit Judges

Opinion filed September 26, 1985

MEMORANDUM OPINION OF THE COURT

TER, Circuit Judge:

1. Attorney Kenneth Behrend sought attorney's fees, costs and expenses after settling an action brought under the Federal Tort Claims Act, 28 U.S.C. Section 1346(b) (1982). The district court limited Behrend's contingent fee to 25 percent of the cash award and denied a petition for costs and expenses. The court also ordered that Behrend refrain from pressing any claims for fees, costs, or expenses against his former clients unless authorized by the court. Behrend appealed the district court's ruling on attorney's fees, costs, and expenses and this court affirmed it in all respects. Godwin v. Schramm, 731 F.2d 153 (3rd Cir. 1984), cert. denied, 53 U.S.L.W. 3269 (1984). Behrend then

filed a Rule 60(b) motion for relief from the district court's order prohibiting him from pursuing further claims against his former clients. The district court denied the motion and Behrend appealed to this court. We find that the district court did not abuse its discretion in denying the motion, and accordingly, we affirm.

2. Appellants Kenneth Behrend, and the law firm of Behrend, Aronson, and Morrow, formerly represented the late Alton Godwin and his wife in a medical malpractice suit predicated on the Federal Tort Claims Act. In December of 1982, the Godwins, against the advice of Behrend, who wanted to go to trial, agreed to settle their claim against the United States for $1,125,000.00. The settlement agreement also stipulated that the Veterans Administration would provide

free medical care to Mr. Godwin for life.

3. During proceedings before the district court, the Godwins questioned the fee that Behrend sought as part of the settlement. Although the settlement agreement provided for a cash payment of $1,125,000.00 and free lifetime medical care, Behrend calculated the value of the settlement at $2,091,000 was obtained by estimating the average value of medical care to be provided as $4,830,000.00, 20 percent of which is $966,000.00, and then adding $966,000.00 to the cash offer of $1,125,000.00 to total $2,091,000.00. Thus for fees and costs, Behrend requested $582,750.00, leaving the Godwins with $542,250.00.

4. As required by 28 U.S.C. Section 2678, the district court limited Behrend's contingent fee to

$281,250.00, or 25 percent of the cash settlement of $1,125,000.00. The district court also excluded future medical benefits from the base upon which Behrend's fees could be calculated. The court denied Behrend's petition for fees and costs totaling $62,015.00. The court further ordered Behrend to refrain from pressing any claim or demand in any court against the Godwins for any fee, expense, or cost unless authorized by the court.

5. In his first appeal, Behrend challenged the district court's ruling on attorney's fees, costs, and expenses. He did not, however, object to the court's order that he and his law firm refrain from pursuing any further claims against the Godwins. This court affirmed the orders of the district court in all respects.

Godwin v. Schramm, 731 F.2d 153 (3rd Cir. 1984), cert. denied, 53 U.S.L.W. 3269 (1984). Behrend then filed a Rule 60(b) motion seeking relief from the district court's order prohibiting further claims against the Godwins. The district court denied the motion and Behrend appealed.

6. Behrend first argues that the district court lacked jurisdiction to enter an order prohibiting him from pursuing claims against his former clients. We preliminarily note that the district court had jurisdiction over the Godwin case by virtue of the Federal Tort Claims Act, 28 U.S.C. Section 1346(b) (1872). It is well settled, moreover, under the All Writs Act, 28 U.S.C. Section 1651(a) (1982), that district courts of the United States may enjoin the filing of lawsuits in appropriate circumstances.

In re Oliver, 682 F.2d 443 (3rd Cir. 1982). Furthermore, an order restricting the filing of meritless cases by a litigant whose complaints raise claims identical to or similar to those that already have been adjudicated certainly falls well within the broad scope of the All Writs Act. Id. at 445.

7. In this case, Behrend previously appealed to this court, where all the orders of the district court were affirmed. In that appeal, Behrend did not challenge the district court's ruling prohibiting him from seeking costs and expenses from the Godwins. However, this Court stated that "if Behrend had any viable claim against the Godwins for costs, it has not been preserved." Godwin v. Schramm, 731 F.2d 153, 160 (3rd Cir. 1984), cert. denied, 53 U.S.L.W. 3269 (1984). Thus

Behrend's present action is meritless, and pursuant to the All Writs Act, the district court properly exercised its jurisdictional powers to enjoin the filing of a frivolous claim. It should also be noted that at the present time Behrend has two lawsuits, arising out of the same action, pending against Judge Ziegler, the district court judge in the case, and Craig McKay, the Assistant United states Attorney who originally handled the case.

8. In the prior appeal to this court, Behrend challenged the district court's orders as to fees, costs, and expenses. At that time, Behrend could have also challenged that aspect of the district court's order prohibiting him from pursuing claims against the Godwins. He did not do so. He now contends that the district court should have held a hearing before entering an

order prohibiting him from pursuing claims against the Godwins. Once an appeal has been taken and decided, however, "[t]he district court is without jurisdiction to alter the mandate of [the court of appeals] on the basis of matters included or includable in [the] prior appeal. Reese v. Volkswagen A.G., 679 F.2d 336, 337 (3rd Cir. 1982) (emphasis added). Therefore, under this principle of res judicata, Behrend may not now challenge the procedure followed by the district court or the basis for its decision on any grounds that he could have, but did not, raise previously.

9. Behrend finally contends that the order unjustly bars him from pursuing valid claims for reimbursement against his former clients. In his prior appeal to this court, Behrend sought reimbursement for costs and

expenses, but failed to specifically identify from whom he sought reimbursement. Characterizing Behrend's position as "somewhat equivocal," the court considered his entitlement to reimbursement from either the United States or the Godwins. We found that Behrend's claim for reimbursement from the United States was precluded by the settlement agreement. We also found that any claim for reimbursement from the Godwins had been waived by virtue of the fact that no timely petition for reimbursement from them had been filed. Godwin v. Schramm, 731 F.2d 153, 162 (3rd. Cir. 1984), cert denied, 53 U.S.L.W. 3269 (1984). Thus, Behrend's claims for reimbursement from the Godwins have already been litigated before the district court and this court. The doctrine of res judicata

bars further litigation of these same claims. As a result, Behrend has no valid claims against the Godwins.

10. Finally, we find this appeal to be frivolous. Behrend has represented objections to this court that should have been raised on direct appeal. He presents other claims which are barred by the doctrine of res judicata. Pursuant to Rule 38 of the Federal Rules of Appellate Procedure, if a Court of Appeals determines that an appeal is frivolous, it may award just damages and single or double costs to the appellee. See 28 U.S.C. Section 1912; United States v. Isenhower, 754 F.2d 489 (3rd Cir. 1985) Accordingly, we order that double costs should be awarded to appellee and the judgment of the district court is affirmed in all respects.

TO

THE CLERK

Please file the foregoing opinion.

JAMES HUNTER, III
Circuit Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ALTON GODWIN and KAREN GODWIN, his wife,	)	
Plaintiff,	)	
vs.	)	
UNITED STATES OF AMERICA	)	
Defendant and Third-Party Plaintiff	)	Civil Action 81-856
vs.	)	
EYE AND EAR HOSPITAL, DALE McMURDO, FRANK KAISER, HOWARD F. ARMOUR,	)	
Third-Party Defendants	)	

ORDER OF COURT

AND NOW, this 7th day of December 1984, the court finds as follows:

WHEREAS, the motion of Kenneth W. Behrend and Behrend, Aronson and Morrow for relief under Rule 60(b) is in effect a collateral attack upon the judgment of this court dated January 18, 1983; and

WHEREAS, the United States Court of Appeals for the Third Circuit affirmed the judgment and order of this court in its enirety as reported at Godwin vs. Schramm, 731 F.2d 153 (3rd Cir. 1984), and the United States Supreme Court denied certiorari as reported at 53 U.S.L.W. 3269 (1984); and

WHEREAS, there is no basis for relief under Rule 60(b); and

WHEREAS, Kenneth W. Behrend had the opportunity and did present the same contentions to the Court of Appeals without success; and

WHEREAS, the Court of Appeals affirmed this court's denial of costs and expenses, and affirmed this court's award of counsel's fee, and also affirmed the injunctive relief ordered by this court; and

WHEREAS, the United States Court of Appeals for the Third Circuit affirmed the district court by judgment order dated December 13, 1983, in the claim of the United States for contribution in the third-party action, a copy of which is attached and marked Exhibit A.

IT IS ORDERED that the motion of Kenneth W. Behrend and Behrend, Aronson and Morrow for relief under Rule 60(b)(6) be and hereby is denied.

Donald E. Ziegler
United States District
Judge

cc: Kenneth W. Behrend, Esquire
Craig R. McKay, Esquire
Carl F. Boyer, Esquire
Wilbur McCoy Otto, Esquire
George M. Weis, Esquire
Robert A. Zunich, Esquire
Paul J. Brysh, Esquire

APPENDIX C

731 F.2d 153

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 83-5065, 83-5129, 83-5130

ALTON GODWIN and KAREN GODWIN, his wife

v.

VICTOR SCHRAMM,
UNITED STATES OF AMERICA

Kenneth W. Behrend,

Appellant

Appeal from the United States
District Court for the Western District
of Pennsylvania (Pittsburgh)

(D.C. Civil No. 81-0856)

Argued December 1, 1983
BEFORE: GIBBONS, SLOVITER, Circuit Judges,
and GREEN, District Judge*

(Opinion filed March 30, 1984)

Samuel C. Stretton (Argued)
Block, New & Stretton
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Attorney for Kenneth W. Behrend

* Hon. Clifford Scott Green, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

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Attorney for Appellees
Alton Godwin and Karen
Godwin

OPINION OF THE COURT

SLOVITER, Circuit Judge.

At issue is the 25 percent statutory limit on attorneys fees in federal tort claims. The plaintiffs below, Alton and Karen Godwin, settled their medical malpractice claim against the United States for a cash payment of $1,125,000.00 and provision for lifetime medical care by the Veterans Administration (VA). Kenneth Behrend, the lawyer who represented the Godwins, appeals from the district court's orders limiting his contingent fee to 25 percent of the cash award and excluding the future medical benefits from the base upon which the fee may be calculated. We affirm.

I.

FACTS AND PROCEDURAL HISTORY

Kenneth Behrend and the law firm of Behrend, Aronson & Morrow (jointly

referred to as Behrend) were retained by the Godwins following a referral after Godwin suffered injuries while undergoing surgery by Veterans Administration physicians. During the surgery, which was performed to remove growths from Godwin's vocal cords, a laser beam ignited oxygen being administered through a tube in Godwin's throat. Godwin's entire bronchial tract was severely damaged; his left lung was totally impaired and because scar tissue obstructs his airway Godwin must breathe through a tracheostomy and undergo frequent operations to dilate the airway. He can speak only with the aid of an electronic box. Godwin was 34 years old at the time of the surgery, was a veteran, was disabled from a job related injury, and was married with two young children.

Behrend filed an administrative claim with the Veterans Administration

on August 11, 1980 alleging liability of Dr. Victor Schramm, supervising surgeon of the VA. On November 18, 1980, Godwin executed a power of attorney to Behrend that provided for a contingent fee of 40 percent in connection with the prosecution of his "claim against Brunswick and others" for the injuries. App. at 37a. In April 1981, Behrend filed a Pennsylvania state court suit against Brunswick Corporation, the seller of the endotracheal tube used in the operation. That suit was dismissed after some discovery. Behrend also filed suit in state court against Dr. Michael Duvall, the resident who performed the operation, and Dr. Schramm. In May 1981, pursuant to 38 U.S.C. 4116 (1876), the United States removed the case to the United States District Court for the Western District of Pennsylvania, substituted itself as

the defendant, and later brought some third-party defendants into the case.

In August 1981 Behrend sent the Godwins a letter informing them that their fee "will be limited to 25 percent of the total gross recovery." Behrend did not inform the Godwins that because the case was now a federal tort claim action, it came under 28 U.S.C. Section 2678 which limits attorney's fees to 25 percent of a judgment of settlement. Instead, the letter Behrend sent stated, "We have taken this action (25% fee) after reviewing your case and coming to the conclusion that your damages are, indeed, more substantial than was understood at the time of the Power of Attorney was signed." App. at 38a. There was no written acceptance by the Godwins, and there is no records of assent by them.

The matter proceeded and ultimately a settlement was negotiated for a cash

payment of $1,125,000.00 and provision for lifetime medical care and treatment at the Veterans Administration Hospital.[1] Behrend counseled the Godwins

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1. Paragraphs 3 of the settlement agreement provides:

3. That the Veterans Administration and its successors or assigns shall continue to provide full and complete medical care and treatment to Alton Godwin for the rest of his life in accordance with the applicable Veterans Administration statutes, regulations and directives governing delivery of health care services by the Veterans Administration. This includes, but is not limited to, full medical treatment, restorative treatment, maintenance treatment, emergency treatment, psychiatric treatment, hospital care, nursing home care, domiciliary care and all other medical care and services in accordance with the applicable Veterans Administration statutes, regulations and directives. In no event shall the quality of medical care and treatment that has been provided to Alton Godwin to date be diminished or compromised.

Alton Godwin shall be eligible for medical care and treatment as if the injuries he sustained on March 25, 1980, were service connected for the purposes of 38 U.S.C. Section 610, 612, 614, 618 and 619.

App. at 59a.

to reject this proposal and to proceed to trial. He also prepared a settlement sheet which he presented to the Godwins in November 1982. This document, signed by the Godwins authorized Behrend to approve the settlement and to make distribution in the manner set forth. The settlement sheet calculated the amount "to be received in settlement" as $2,091,000.00.[2] This sum, which

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2. The explanation in the Settlement Sheet is as follows:

This figure $2,091,000.00 is computed as follows:
cash $1,125,000.00 plus 20% of the average medical care to be provided, determined to be $3,220,000 to $6,440,0000. which averages to $4,830,000. 20% is used as it is assumed, maybe improperly, that federal benefits would have been 80% of this. To the extent that any of the 80% medical benefits would not be provided, counsel waives the right to claim a fee on such higher value of benefits to be provided. 20% of $4,830,000 is $966,000. ---

App. at 57a.

is $966,000 over the cash payment, is based upon Behrend's calculation of the present value of future medical care to Godwin at $4,830,0000. Since 80% of Godwin's medical costs would have been paid by the Medicare program, Behrend included 20 percent of the estimated value of that care as part of the settlement proceeds. The estimated value of medical care was based on a life expectancy 75 percent of normal, although there was no conclusive estimate of Godwin's life expectancy and predictions ranged from three or five years to normal. Behrend then added the $966,000.00 to the cash award to arrive at a figure for settlement proceeds of $2,091,000. and listed his fee as $522,750, or 25 percent of the total. The document provided that Behrend would be paid $350,000 upon settlement and the remainder in six

annual installments of $28,791.66. The document also provided for payment upon settlement of approximately $60,000 in expenses, and stated that the signatures of the Godwins were "with the intention of being legally bound."

While Behrend was still urging the Godwins to go to trial, Mrs. Godwin telephoned the district judge. As the judge later stated on the record, Mrs. Godwin said she was confused, "[s]he believed that they were receiving bad advice, that Mr. Behrend had recommended against the settlement, and that Mr. Behrend was charging what she concluded were unreasonable fees which would prevent the Godwins from recovering virtually any money from this case." App. at 647a. The judge stated that the Godwins "were in a quandary as to what to do," and he told her he would address the matter at the

conference on Monday morning. Id. After this conversation the Godwins decided to accept the government's offer. A settlement conference was held December 13, and the events that transpired there are critical to this appeal.

The district court began the conference by reviewing the settlement agreement, and ruled that the only viable claims were those for the Godwins and not for their children. He then turned to the matter of lawyers' fees, referred to the statutory limit of 25 percent, stated that "no claim or demand for counsel fees may be made for any service rendered by the Veterans Administration in the future," and stated that counsel fees would be $281,250.00 or 25 percent of the cash settlement of $1,125,000.00 App. at 609a. Behrend did not object nor did

he make any reference to the settlement sheet which had been signed the month before. The participants discussed the purchase of an annuity by the government for the Godwins with some of the proceeds. Behrend then stated that he didn't want to take any responsibility for the enforcement of the agreement because it failed to give the Godwins the "unfettered right to go to civilian medicine." The court stated the agreement was enforceable by an injunction against the Veterans Administration if necessary. A significant colloquy then took place, quoted in full in the appendix to this opinion, during which the district court asked:

Now, are you satisfied with your lawyer?

MR. GODWIN: Yes.

MRS. GODWIN: My understanding is

he will be paid off in full?

THE COURT: Yes.

App. at 619a. The judge reiterated that the Godwins should not pay any fee beyond the amount that had been stated. Behrend said that "we are abiding by, of course, the statute, the $281,250.00," and asked the court whether he would be able to collect approximately $60,000.00 in expenses. The judge instructed Behrend to file a petition and stated he would decide if any such expenses are recoverable. During this second discussion of fees and expenses, Behrend again failed to mention the settlement sheet. In an order dated December 15, 1982, the court directed payment of $281,250.00 to Behrend, Aronson & Morrow.

On December 20 Behrend notified the court that he intended to press a claim for $522,750.00. Shortly thereafter

the Godwins discharged him as their counsel. At a second settlement conference on December 30, 1982, the Godwins expressed their confusion over the amount of the fee. The Godwins referred to letters they had been getting from Behrend. The district court stated its recollection "that before our last conference I directed a question to Mr. Behrend, inquiring whether he intended to charge a fee on the future medical expenses. And it is my recollection that he answered that question in the negative." Behrend replied, "Judge Ziegler, we are not charging on future medical expenses; we are charging on the present worth of those medical expenses," and stated, "I make it very clear that we are going to assert a claim in the amount of some $521,000.00." App. at 644a. The

Assistant United States Attorney confirmed his recollection that Behrend told the court at the earlier conference there was never any agreement to compute attorney's fees on the value of future medical benefits, and the attorney for the third party defendants also stated he "had the impression that [the court was] under the impression that he said there was no such agreement." App. at 645a. The court directed that the order of December 15 awarding counsel fee at $281,250.00 would stand.

Behrend filed a motion for reconsideration of attorney's fees and a petition for assessment of costs. Both were denied by an opinion and orders dated January 18, 1983.

In its opinon sur Behrend's motion for reconsideration, the trial court held that the only power of attorney of

record, that dated November 18, 1980, was void, or at least voidable by plaintiffs, because the provision that counsel shall receive 40 percent of any recovery violated the mandate by Congress in 28 U.S.C. Section 2678 that no fee under the federal tort claims statute shall exceed 25 percent. The court held that counsel had not shown that the letter of August 3, 1981 (reducing the fee to 25%) had been accepted, and that the settlement sheet, the only document which referred to the need to pay a fee based on the average value of the medical care to be provided, could not be considered an enforceable contract because it lacked valuable consideration.

The court also held that even if the settlement sheet constituted a contract, it was unenforceable on grounds of public policy, illegal, and

obtained in violation of DR 2-105(A) of the Code of Professional Responsbility. The court characterized counsel's conduct as the most "egregious example of overreaching by a lawyer" encountered by the court "in 10 years of public service and 22 years at the bar," App. at 14a, and also criticized the caliber of representation by counsel, giving specfic examples. App. at 20a-21a.

In addition to limiting counsel fees to 25 percent of the cash payment, the court denied counsel's motion for an award of costs in the sum of $62,015.19 both because counsel had no contract for reimbursement of costs with Godwin in the letter of August 3, 1981, and because the denial "is an appropriate sanction for a lawyer who intentionally attempts to extract an illegal fee from a person to whom Congress and the

Supreme Court have accorded special consideration."

Behrend appealed from the district court's three orders, and the appeals were consolidated before this court. The Godwins and the United States have each filed a brief as appellees in support of the orders of the district court. The Pennsylvania Trial Lawyers Association has filed a brief amicus curiae in support of Behrend's position.

II.

ATTORNEY'S FEES

A. Structured Settlements

Appellant and the amicus curiae suggest that the district court's decision will hinder the development of structured settlements and that the advantages of such settlements will be lost to the parties and the judicial system. Generally, a structured

settlement entails a cash payment made on settlement, sufficient to cover at least special damages such as medical bills incurred and past lost wages, and guaranteed periodic payments in the future. Such payments are commonly funded by an annuity policy. This settlement technique has been both applauded and criticized. Its proponents point to the tax free status of the payments if certain requirements are observed and the "spendthrift preventative nature" of periodic payments. See, e.g., 7 R. Conason, Damages in Tort Actions Section 82.20, 83.02 (1982); Krause, the Benefits of Structured Settlements, N.Y. St. Bar J., Jan. 1982, at 13. Critics stress that the defendant's insurance company might not pass on to the plaintiff some of the cost savings achieved through this form of settlement, and that the

possibility of carrier insolvency is also a significant drawback. See, e.g., Broder, Structured Settlements: The Argument Against, 1981 Pers. Inj. Ann. 838. All agree that the manner in which contingent fees are to be computed in a structured settlement with periodic payments, particularly when there is a reversion in the event of death, poses a dilemma. See Conason at Section 83.3.

Since the use of a structured settlement as a vehicle for resolving major tort litigation is "still in its embryonic stages", see Hyland & Keeley, Using the structured Settlement, Nat'l L.J., Dec. 19, 1983, at 15, it is unlikely that Congress contemplated how such benefits were to be calculated in the 1966 revision of section 2678 of the Federal Tort Claims Act. That provision states, in relevant part, "No

attorney shall charge, demand, recieve, or collect for services rendered, fees in excess of 25 per centum of any judgment rendered. . .or settlement made" in a federal tort claim. 28 U.S.C. Section 2578 (1982).

This replaced the requirement in the original statute under which the district court was to determine and allow a reasonable attorney fee of up to 20 percent of the recovery. The requirement of district court approval of the fee in each case had proved burdensome. The authors of the 1966 amendment explained, "The actual amount of attorneys fees within the statutory limit . . .is made a matter for determination between the litigant and his attorney." S. Rep. 1327, 89th Cong., 2d Sess., reprinted in 1966 U.S. Code Cong. & Ad. News 2515, 2521. To ease court congestion, the 1966 Act

also provided for administrative settlement of tort claims. Id. at 2516. At the same time that Congress provided for determination of the fee by the parties, it also sought to discourage attorney overreaching by keeping in place the language penalizing attorneys who do not abide by the 25 percent limitation.[3] See United States vs. Cohen, 389 F.2d 689, 691 (5th.Cir. 1967); Schwartz vs. United States, 381 F.2d 627, 631 (3d.Cir. 1967).

The application of the 25 percent limit to structured settlements has

3. That language is, "Any attorney who charges, demands, receives, or collects for services rendered in connection with such claim any amount in excess of that allowed under this section, if recovery be had, shall be fined not more than $2,000 or imprisoned not more than one year, or both." 28 U.S.C. §2678 (1982).

rarely been considered. In a state court case, the Superior Court of Pennsylvania distinguished between an award of counsel fees where the settlement formula is based on the right to receive future payments with the present value of the future projected loss immediately paid to the victim, and an award of counsel fees which the attorneys seek to base on a sum the client may never receive. In Johnson vs. Sears, Roebuck & Co., 291 Pa.Super. 625, 629, 436 A.2d 675, 677 (1981), the court held that attorney's fees may only be based on amounts actually received by their clients. Thus, the Johnson court held that where the future payments were funded by an annuity policy, the cost of the annuity represented the base on which attorney's fees were due. 291 Pa.Super. at 630, 436 A.2d at 678. The

dissenting judge would have used the present value of the future benefits as determined by actuarial tables as the basis for computation of the fee.

Not only is there a difference of opinion as to computation of the fee when the settlement provides for payment of fixed sums in the future, but the situation becomes yet cloudier when the settlement contains an item, such as the provision of future medical services, which carries the inherent contingencies of type, quantity and future costs of service as well as of the victim's future medical condition and life expectancy. When the ultimate value of the settlement is uncertain, clients may be paying the lawyer more than the statutory 25 percent of what they actually will receive if the beneficiary dies before the passage of

the anticipated period upon which the settlement was based.

It may be, as appellant suggests, that contingent services are susceptible of determination by experts and reducible to present value. If so, computation of counsel fee on such a basis may not violate the literal terms of the statutory maximum fixed by Section 2678, provided there are adequate findings by the district court as to present value supported by the record.

Nonetheless, we see substantial difficulties that may arise in applying section 2678 to deferred payment settlements or settlements based on provision of contingent services. In enacting the Federal Tort Claims Act in 1946, Congress showed a special solicitude for persons injured by federal officers. The limitation of

the amount of counsel fee reflects congressional concern that the victims of federal torts be treated fairly and equitably. See S.Rep. 1327, 89th Cong., 2d Sess. reprinted in 1966 U.S. Code Cong. & Ad.News 2515, 2521. Nothing in the legislative history of the 1966 amendments suggests that there was any diminution of this congressional concern.

It is apparent that if an attorney demands payment of a fee based on the value of deferred payments reduced to present value, the federal victim may be left destitute. For example, a settlement providing for $100,000 cash at time of signing and future payments which, reduced to present value, can be found to be worth an additional $400,000, may generate a demand for prompt payment of counsel fee in the amount of $125,000, representing 25

percent of the settlement value of $500,000. Even though this amount is within the statutory limit, a requirement that the tort victim produce the funds for the fee at that time would not only exhaust the immediate payment but could put the client in debt and subject to attachment of assets. As is known, such matters are not always resolved amicably between counsel and the client.

In the above illustration, the concern is not the amount of the fee but the method of payment. If the lawyer's payment were tied to payments as received by the client, the problem for the client would be alleviated. However, this approach was rejected by the Seventh Circuit. In Robak vs. United States, 658 F.2d 471 (7th.Cir. 1981), a settlement award of

$900,000 for a rubella syndrome child provided for cash payment of $300,000 and the remainder in the form of a reversionary trust, with the money to be disbursed as needed to care for the child and the remainder, if any, to revert to the government at her death. The district court limited the attorney's fee to amounts proportional to and concurrent with disbursement of the funds. 503 F.Supp. 983, 984-85 (1980). In reversing on this issue, the Seventh Circuit held the trial court exceeded its authority under section 2678.

Robak is distinguishable from the facts before us because the $600,000 balance was set aside in the trust for the plaintiff's benefit, albeit payment was contingent on the child's survival. Therefore, we venture no opinion as to whether we would be inclined to follow

that circuit's approach. We note that in Johnson, the Pennsylvania Superior Court also characterized payment of attorney's fees as a percentage of each future periodic payment to the client as "both unwieldy and impractical", 291 Pa.Super. at 630, 436 A.2d at 678, even though the court recognized that the Pennsylvania Workmen's Compensation Act mandates this method for future services.

When the settlement provides for future services rather than funds, the concomitant difficulty in setting the appropriate fee is compounded. The district court here focused on the contingent nature of the benefit to Godwin when it stated of the fee demand, "It is illegal because 25 percent of an unknown is zero." App. at 17a. The district court appears to have taken too narrow a view of section

2678. The parties may anticipate varying forms of damageawards and tailor counsel fees accordingly. There is no indiction tht Congress intended to prohibit a litigant and attorney from agreeing, for example, to forgo a large cash award in favor of a substantial package of benefits, to assign a present value to the benefits and to allot the lawyer a share of that figure. The lawyer's share would not be more than she bargained for at the outset of the litigation. See Dunn vs. H.K. Porter Co., 602 F.2d 1105, 1111 (3d.Cir. 1979).

It is unfortunate that the 1966 Amendments removed the requirement for district court approval of counsel fees in all federal tort claims actions. In cases where the settlement is in a form otherthan a lump sum cash award, district court supervision and approval

could obviate many of the problems referred to above. Indeed, the district court may have inherent authority in such cases. See, e.g., Dunn vs. H.K. Porter Co., 602 F.2d at 1112 n. 10; Schlesinger vs. Teitelbaum, 475 F.2d 137, 140 (3d.Cir.), cert. denied, 414 U.S. 1111 (1973). In light of the competing social policies and the absence of any congressional illumination, it would be preferable if Congress were to determine the most efficacious method to encourage innovative forms of settlement without chilling or penalizing counsel who have pursued settlements that maximize their clients' benefit and conserve judicial resources, see Robak, 658 F.2d at 480 n. 28, and at the same time, to protect federal tort victims from unreasonable payments to their lawyers. Until

Congress sheds light on these questions, we suggest infra a number of considerations relevant to an evaluation of fees based on future services in a structured settlement. See typescript at 18.

B. Waiver of Additional Counsel Fee

Because of the unique circumstances of this case, we can dispose of the appeal without applying section 2678 to the counsel fees. We agree with .pa appellees Godwins and the United States that Behrend is precluded from seeking a larger attorney fee by the doctrine of equitble estoppel, which prevents a party from assuming a position inconsistent with an earlier position upon which another party relied. see Blofsen vs. Cutaiar, 460 Pa. 411, 417, 333 A.2d 841, 843-44 (1975); Northwestern National Bank vs. Commonwealth, 345 Pa. 192, 196-97, 27 A.2d

20, 23 (1942). See also Morrison-Knudson Co.Vs. Rocky Mountain Chapter, N.E. C.A., 370 F.2d 463, 467 (10th.Cir. 1966).

Before the beginning of the December 13, 1982 conference, in response to the court's inquiry, Behrend specifically denied that he had an agreement for counsel fees based on future medical services. See App. at 647a. His subsequent explanation that what he was seeking was not a fee based on future medical services but rather a fee based on the present value of such services, App. at 643a, is simply unpersuasive.

If indeed there had been any misunderstanding, as Behrend contends, he had ample opportunity to clarify his position during the conference on December 13. On several occasions during that conference, the district court stated that Behrend's fee would

be $281,250, 25 percents of the cash award. App. at 609a, 610a. Behrend stated thereafter that he was "abiding by ... the $281,250.00." App. at 621a. He did not produce or mention the settlement sheet that he had given the Godwins the month before. It was not until after the court's order directing payment of $281,250 to Behrend's law firm that Behrend notified the court of his intention to seek nearly twice that amount.[4] The court subsequently stated that after this discussion at the conference on December 13 regarding the counsel fee "the Godwins stated on the record that they felt the settlement was fair and reasonable." See App. at 647a.

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4. In the meantime the Godwins had begun negotiating the purchse of an annuity with parrt of their cash award. According to the appellant's own figure, the new demand would have taken 46 percent of the Godwins' cash award.

These circumstances provide an adequate basis to affirm the district court's order with regard to the amount of attorney's fees. Our standard on review is whether the court abused its discretion, see, e.g., Dunn vs. H.K. Porter Co., 602 F.2d at 1112 n.10; Schlesinger vs. Teitelbaum, 475 F.2d at 140, a standard which places a considerable burden on appellant. See Lindy Brothers Builders, Inc. vs. American Radiator, 540 F.2d 102, 115-16 (3d.Cir. 1976). As this court explained in Dunn, the factors to be considered by the trial court include

> the manner into which the contract was entered, the status and sophistication of the plaintiffs, whether the course of the fee payment is a settlement fund or a tax against the defendants, the size of the proposed award and whether the fee allowed is sufficient to encourage capable counsel to undertake such litigation in the future.

602 F.2d at 1110. Most of these factors were referred to by the district court in its opinion. App. at 19a-21a.

We do not imply that a fee may not be based on the value of services to be provided the client in the future where the possibility has been fully explained to the client at the time the fee contract is signed, the services to be provided are clearly the productof the litigation and/or the settlement negotiations, the services are susceptible of accurate monetary evaluation and reduction to value, and there are findings by the trial court on the value of the services and the equity to the plaintiffs of the proposed method of payment. In this case, these factors are conspicuously absent.

The nature and applicability of a contract, if any between the Godwins and Behrend covering the fees to be paid in litigation with the United States is ambiguous. Behrend's reliance on the November settlement sheet is troublesome because it was signed only after conciliation conferences had been conducted and settlement was on the way, and after Behrend had written the district court on September 29 requesting that action on the issue of counsel fee be deferred. App. at 56a. Although an associate of Behrend averred that he went over the settlement fee with Mr. Godwin, it is undisputed that the document was signed by Mr. Godwin while he was in the VA Hospital having his airway dilated, and on his releaes he took it home for his wife's signature in Ohio. App. at 633a, facts which do

not appear to comport with the lawyer's obligation to make discussion of fees "part of the full consideration with the client of all aspects of a structured settlement ...." Lampo & Waldeck, Structured Settlements: A Primer, 39 J.Mo. Bar 181, 186 (1983). See also, 7 R. Conason, Damages in Tort Actions {83. 03(3)..03(6).

In light of all the circumstances in this case, we cannot hold that the district court abused its discretion in denying Behrend's petition for additional counsel fees.[5]

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5. In light of our disposition, we do not reach the district court's apparent finding that Behrend was not responsible for obtaining the benefit of the medical services. In its opinion, the district court stated that "[p]laintiffs will receive those benefits to which they are entitled whether they retained counsel or not", that the VA provided medical care for 2-1/2 years before the settlement, for seven months before counsel even secured a power

III.

Costs and Expenses

Behrend also appeals from the denial of his "right to be reimbursed for the substantial legal costs and expenses incurred in representing the Godwins," appellant's brief at 34, which total $62,015.19. We need not reach the district court's holding that costs can be denied as an appropriate sanction for what the court regarded as Behrend's attempt to extract an illegal fee. Instead, we affirm the court's denial of costs on another basis.

As set forth above, the district

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of attorney, and that "the promise to continue such care in the future bears little relation to counsel's efforts." App. at 16a. We have some difficulty reconciling these statements with the court's earlier statement that "[i]f Mr. Godwin proceeds to judgment in this case rather than accept a proposal by the United States by virture of that judgment, he will not qualify for future treatment by the Veterans Administration." App. at 602a. We need not resolve this issue.

court gave Behrend leave to file a petition for reimbursement of expenses.[6] The petition filed by Behrend evidently sought costs from the United States as it named the Godwins as petitioners and asked that "this Honorable Court award them costs of $62,015." App. at 187a-88a. The statute providing for costs in suits against the United States limits a judgment for costs to the "prevailing party." 28 U.S.C. {2412

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6. At the conference on December 13, 1982, Behrend indicated that he sought recovery of expenses from the Godwins, since he stated, "We have discussed with Mr. and Mrs. Godwin that our expense on their behalf was about $60,000, and whether they intend to pay that or not should be mentioned, In your statement it appeared as though they would not pay that." App. at 621A. In response, the court stated, "The way we will handle any claim for expenses in prosecuuting this case is that Mr. Behrend will file a petition with the Judge. The Judge will look at it. If he decides any such expenses are recoverable an Order will be entered." As pointed out in the text, Behrend did not file a petition for reimbursement from the Godwins.

(1982). Although the settling party is the "prevailing party," see Maher vs. Gagne, 448 U.S. 122, 129-30 (1980), the settlement agreement provided for "full settlement and satisfaction of any and all claims," which extinguished the Godwins' claim, and Behrend's derivative claim, if any, for reimbursement from the Government.

Behrend's position is somewhat equivocal but he does not appear to contend that he is entitled to reimbursement from the Godwins. The district court found that there was no contractual basis on which to award such reimbursement, and we agree. As the court viewed the documents, only the letter from Behrend to the Godwins dated August 3, 1981 could be deemed an implied contract, and that document "failed to include any provision for reimbursement of costs." App. at 21a.

Furthermore, if Behrend had any viable claim against the Godwins for costs, it has not been preserved. In response to the court's invitation to file a petition for expenses, Behrend filed a petition on behalf of the Godwins, not one on behalf of himself seeking recovery from the Godwins. It was the petition on behalf of the Godwins that the district court denied, and which is the subject of this appeal. Since there is no basis for awarding costs against the government, and no petition for reimbursement of costs from the Godwins was timely filed by Behrend and has therefore been waived, we will affirm the district court's order denying costs.

For the reasons set forth, the judgment of the district court will be affirmed.

APPENDIX

Excerpt of Conference on December 13, 1982

Now, are you satisfied with your lawyer?

MR. GODWIN: Yes

MRS. GODWIN: My understanding is he will be paid off in full?

THE COURT: Yes. Do you have any complaints about any representation that you have received in this case?

MRS. GODWIN: Do you?

It is very confusing.

THE COURT: We are here to try to make it understandable.

MRS. GODWIN: Somewhere along the line I misunderstood, and so did my husband.

THE COURT: Well, you understand that you do not have to pay anything on medical in the past or in the future; do you understand that?

MRS. GODWIN: Yes, sir.

THE COURT: And if anyone should make such a claim, I want you to bring it to my attention immediately. What we have addressed here is what you will receive and what your lawyer will receive, and to protect your lawyer I am obligated to inquire whether you have any questions or any complaints at this time, because they should be put on the record.

MRS. GODWIN: I have the question of, if we have another contract with our lawyer, other than the agreement, my understanding is that he has been paid?

THE COURT: The payment to lawyers under these types of cases are controlled by the .pa Court. And any agreement to the contrary is now void.

MRS. GODWIN: Okay.

THE COURT: And you should not pay any bill to anybody other than what I have indicated unless I otherwise order it. Do you understand that?

MR. GODWIN: Yes.

THE COURT: And you are free to call my office at any time to advise me of any claims or demands by anybody, any of your present lawyers or any other lawyers who may come to see you. Do you understand that?

MRS. GODWIN: Yes, Sir.

THE COURT: And if anybody harasses you or bothers you down there, while I am not policeman, I do have certain responsibilities, and I will be pleased to listen to any problems that may occur in the future.

MRS. GODWIN: Yes.

THE COURT: Do you understand that?

MRS. GODWIN: Yes, Sir.

Do you?

MR. GODWIN: Yes.

MR. BEHREND: I want to bring something up Your Honor said, and we are abiding by, or course, the statute, the $281,250.00. We have discussed with Mr. and Mrs. Godwin that our expense on their behalf was about $60,000, and whether they intend to pay that or not should be mentioned. In your statement it appeared as though they would not pay that.

THE COURT: I want to repeat what I said. You are to pay no one anything unless otherwise ordered by the Court. The way we will handle any claim for expenses in prosecuting this case is that Mr. Behrend will file a petition with the Judge. The Judge will look at it. If he decides any such expenses are recoverable, an Order will be entered.

What I want to void is you people receiving a bill now, in the next year or in the future for legal fees, expenses incurred, or other types of costs. Don't pay them unless otherwise ordered by the Judge. Do you understand?

MR. GODWIN: Yes.

MRS. GODWIN: Yes.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

APPENDIX D

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ALTON GODWIN and KAREN GODWIN, his wife,	)	
Plaintiff	)	Civil Action 81-856
vs.	)	
UNITED STATES OF AMERICA,	)	
Defendant and Third-Party Plaintiff	)	
vs.	)	
EYE AND EAR HOSPITAL McMURDO, FRANK KAISER HOWARD F. ARMOUR,	)	
Third-Party Defendants	)	

O P I N I O N

ZIEGLER, District Judge

Pending before the court is the motion of Kenneth W. Behrend (hereinafter referred to as counsel) for reconsideration of the order of this court dated December 15, 1982, in which counsel's fee was limited to the

sum of $281,250.00. Counsel urges this court to award fees in the sum of $522,750.00. Counsel also has filed a motion for an award of costs in the sum of $62,015.19. Consistent with counsel's conduct throughout this litigation, he filed a notice of appeal 90 minutes after filing the motion for reconsideration. Since the motion of the United States to confirm the settlement, and counsel's motions, were filed prior to the notice, and because all pending motions relate to the order of December 15, 1982, we have jurisdiction to resolve these matters. In the event we have no jurisdiction, we write separately to explain the order of December 15, 1982.

We hold that Kenneth W. Behrend and the law firm of Behrend, Aronson and Morrow are limited to the sum of $281,250.00 for services rendered. We

also hold that the motion for costs in the sum of $62,015.19 must be denied for contractual reasons and because counsel intentionally attempted to charge an illegal fee.

A. History of Case

Alton and Karen Godwin filed a civil action for money damages predicated on the Federal Tort Claims Act. Pennsylvania substantive law is controlling. The United States impleaded various third-party defendants and the third-party action was severed for trial. Evidence was presented and the court articulated findings of fact and conclusions of law on December 28, 1982. Resolution of post-trial relief is pending. Judgment has not been entered.

On December 15, 1982, plaintiffs agreed to settle their claim against the United States for the sum of

$1,125,000.00. The United States also agreed to continue to provide medical care and treatment to Alton Godwin for life.[1] The motion for reconsideration is based on counsel's post-settlement contention that he is entitled to a pre-determined fee based not only on the cash paid by the United States but also on "the average value of the medical care to be provided, which averages $4,830,000.00."[2] Counsel computes the fee to be $522,750.00.

We begin our discussion by noting that the only power of attorney of records, dated November 18, 1980, provides that counsel shall receive 40 percent of any recovery.[3] The contract contains no provision that counsel shall be paid a percentage of the medical care to be rendered following a settlement. Moreover, the agreement violates the mandate of Congress that

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"no attorney shall charge, demand, receive or collect for services rendered fees in excess of 25 per centum for any judgment rendered pursuant to section 1345(b) of this title . . . ." 28 U.S.C. Section 2678. Hence, we find that the power of attorney is void, or at least voidable by plaintiffs, because it violates public policy. 4/

The records also reveals that the document was prepared when counsel knew that plaintiffs' claim, at least in part, would be against the United States. This is established by the time records of the law firm which indicate that on August 13, 1980, counsel referred to the claim as Godwin v. United States and Children's Hospital. Nevertheless counsel prepared the power of attorney calling for a 40% fee against another entity;

failed to mention the United States or the statute of Congress; and failed to obtain an executed power of attorney to represent plaintiffs against the United States, or its agents, at any time thereafter.

On August 3, 1981, counsel notified plaintiffs that the fee would be limited to 25 percent but the letter is disingenuous because it implies that the reduction was occasioned by the value of the case, rather than the requirements of federal law.[5/] More importantly, counsel never advised the clients that he was claiming a fee based on "the average value of medical care to be provided."

On September 1, September 7 and November 19, 1982, the court conducted conciliation conferences in an effort to resolve the action prior to trial. The United States offered $1,125,000.00

Cost

in cash and the Veterans Administration agreed to continue to provide medical care to Alton Godwin for life but no separate fund was established for this purpose.

In response to this offer, counsel prepared a "Settlement Sheet," dated November 16, 1982, and Alton Godwin signed the document while hospitalized. Counsel calculated the value of the settlement at $2,091,000.00 and directed that he was entitled to $522,750.00. The sum of $2,091,000.00 was obtained by estimating "the average value of the medical care to be provided, determined to be $3,220,000.00 to $6,440,000.00 which averages $4,830,000.00 ....Twenty percent of $4,830,000.00 is $966,000.00." 6/ This figure was then added to the cash offer of the United States of $1,125,000.00 to generate the figure of

$2,091,000.00 "to be received in settlement."[1] Thus for fees and costs, counsel would receive the sum of $582,750.00 from available cash and the clients would receive $542,250.00. Counsel agreed to receive this sum on the following basis: $350,000.00 at the time of settlement for services rendered; an estimated $60,000.00 at the time of settlement for expenses; and $28,791.66 in six annual installments ending January, 1989.

If the foregoing calculations appear abstruse, imagine the plight of Alton and Karen Godwin. Indeed, in 10 years of public service and 22 years at the bar, this court has never encountered a more egregious example of overreaching by a lawyer.

B. Was There A Contract?

As we have found, the only power of attorney of records violates public

policy. It is either void or voidable by plaintiffs, at least to the extent that the fee exceeds the statutory limit. Some courts have held that such a contract is void ab initio and totally unenforceable. Gramby v. Cobb, 422 A.2d 899, 282 Pa. Super. 183 (1980). In addition, as we have noted, neither the United States nor its agents are mentioned in the document.

The letter of August 3, 1981, may constitute an offer to represent plaintiffs against the United States but counsel has failed to prove the terms of acceptance, despite the affidavits of records in response to our order of December 15, 1982. Thus, when counsel presented the settlement sheet to the clients, he either had no contract of employment at all, or no contractual basis to assert a fee based on the medical care to be provided in the future.

The settlement sheet is no better. It is not an enforceable contract because it lacks valuable consideration. It is a mere declaration of intention, a gratuitous promise at most, that the signers will distribute funds in a particular manner. We find that counsel has no contractual basis to contend that plaintiffs must pay a fee based on "the average value of the medical care to be provided, determined to $3,220,000.00 to $6,440,000.00 which averages $4,830,000.00."

C. The Settlement Sheet

Assuming for the sake of discussion that the settlement sheet constitutes a contract, we hold that (a) it is unenforceable on grounds of public policy; (b) it is illegal; and (c) it was obtained in violation of DR 2-

106(A) of the Code of Professional Responsibility.

We are mindful that a contract between the client and a lawyer is a private matter so long as the agreement does not violate public policy. A contract to pursue a claim under the Federal Tort Claims Act is no exception. Congress removed the discretion of the district courts to adjudicate fees when it amended the Act in 1966. However, federal courts retain the power to enforce the statutory limits imposed by law, and to monitor the contracts of counsel, Dunn v. H. K. Porter Co., 602 F.2d 432, 1108-1109 (3rd Cir. 1979).

The settlement sheet is unenforceable as a matter of policy because it grants to counsel a predetermined fee based on a disputed and indeterminable amount. The value

of future care depends on such variables as the length of Alton Godwin's life; the nature of the medical service; the length of any hospitalizations; and the cost of the care provided by the Veterans Administration. The expense will vary from year to year and counsel has no rational basis to assert what the value may be.

The cases cited by counsel are inapposite because in each instance those courts made findings as to life expectancy and future medical costs. Judgments were entered. Here there are no findings because there was no trial. No judgment was entered on plaintiffs' claim and the settlement offered by the United States did not include a specific fund for the payment of future medical expenses. Moreover, the pre-trial statements of the parties

indicate a substantial disagreement concerning the life-expectancy of Alton Godwin. Thus to award counsel a predetermined fee, under these circumstances, is tantamount to awarding a fee for benefits that cannot be calculated and may never be paid.

Counsel's proposed fee represent 46 percent of the cash received by plaintiffs and the precise sum of $522,750.00 was determined as of the time of settlement. It is therefore not significant that $350,000.00 was to be received at settlement and the balance in six annual installments. Plaintiffs' obligation and the amount thereof were determined.

Counsel attempts to justify the fee by arguing that he negotiated and obtained a future benefit for his clients. The argument is specious. First, plaintiffs will receive those

benefits to which they are entitled whether they retained counsel or not. The Veterans Administration provided medical care for two and one-half years before the settlement and for seven months before counsel even secured a power of attorney. The promise to continue such care in the future bears little relation to counsel's efforts.

More importantly, the predetermined fee based on the estimated value of future medical expenses is excessive and therefore illegal even if we assume arguendo that counsel negotiated for the payment of future medical expenses by the Veterans Administration. It is illegal because 25 percent of an unknown is zero.

We express no opinion on the question of whether a lawyer may secure a power of attorney that provides for the payment of a percentage, not to

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expenses when they are paid on an annual basis in the future. That question turns on (1) whether the lawyer has obtained a benefit for a veteran that would not have been paid otherwise, and (2) whether the concept is violative of unique protection that congress has granted to veterans.

Congress has enacted a statute, for example, restricting any attorney to a fee of $10 to represent a veteran in any claim for monetary benefits against the Veterans Administration. 38 U.S.C. Section 3402(c)(2). the language used by the Supreme Court with regard to that statute is instructive:

> Congress, clearly intended to protect all veterans, competent and incompetent, in all courts, State and Federal, against the imposition or payment of fees in excess of the amount fixed by statute.

Hines v. Lowery, 305 U.S. 85, 90 (1938); see also Hoffmaster v. Veterans

Administration, 444 F.2d 192 (3rd cir. 1971).

Thus it is likely that the courts would proscribe for policy reasons a power of attorney which a veteran has agreed to pay a lawyer a fee based on a percentage of the medical expenses when paid in the future, even when the lawyer has negotiated such an arrangement. A question not here presented.

We hold that, assuming the settlement sheet constitutes a contract, the requirement that Alton and Karen Godwin pay to counsel a fee representing 46 percent of the cash paid at settlement is excessive and illegal under the Federal Tort Claims Act.

D. Illegality

The doctrine of illegality provides that an agreement will not be enforced

when it cannot be performed without violation of a statute. A contract is illegal "if either its formation or its performance is criminal, tortious, or otherwise opposed to public policy." RESTATEMENT OF CONTRACTS Section 512 (1932); RESTATEMENT (Second) OF CONTRACTS Section 179 (1979). As we have noted, the three documents of record on which counsel relies are illegal and unenforceable because, as rehearsed, they are contrary to the clear directive of Congress.

The power of attorney dated November 18, 1980, is illegal on its face. The letter of August 3, 1981, arguably constitutes an offer to contract but it makes no mention of a fee based on future medical benefits and if it did, it too would be illegal under these circumstances. We reject the argument that the words "25% of the total

recovery" somehow authorizes counsel to violate federal positive law by contract. Finally, the settlement sheet is not a contract, but if it is, we hold that the contract is illegal for the reasons previously discussed, and will not be enforced.

E. The Conduct of Counsel

This is a sad case. The sadness began on March 25, 1980, and continues for the Godwins. Fortunately the United States proposed a settlement that is tailored to meet the needs of Alton Godwin. What troubles this court is the conduct of counsel.

That conduct permits the conclusion that counsel opposed the settlement of the case, not because the offer was unreasonable, but because a large fee was in jeopardy if plaintiffs accepted the offer. When the Godwins indicated a willingness to accept, counsel

prepared the settlement sheet of November 16, 1982, to attempt to salvage a fee that the offer had placed in jeopardy.

The power of attorney of November 18, 1980, and letter of August 3, 1981, make no mention of charging a fee for future medical benefits, although counsel was pleased to inform his clients "that there is no fee that will be charged on the pension fund claim."[8/] A waiver of 410 we might add! It is unconscionable, in our judgment, to have prepared the settlement sheet when settlement was imminent, and then use that document as the basis for an additional fee of $241,500.00 against these plaintiffs.

Counsel knows the difference between a power of attorney and a settlement sheet because he lectured a lawyer from Ohio on the former in a letter of

record dated August 11, 1980. A power of attorney is a contract. A settlement sheet is not. Since counsel did not have an enforceable power of attorney when this case was settled, we turn to the appropriate relief.

F. Relief

The motion of Kenneth W. Behrend and the law firm of Behrend, Aronson and Morrow for counsel fees in the sum of $522,750.00 will be denied. We will enforce the terms of counsel's offer, set forth in his letter of August 3, 1981, and limit him to 25 percent of the total recovery which we find to be $1,125,000.00. Counsel is entitled to $281,250.00 for counsel fees and services rendered.

We find this sum to be generous in view of the caliber of representation in this case. The case was settled not because of the assiduous efforts of

counsel but the nature of the injuries. Indeed many of the substantive legal concepts, and most of the rules of procedure, seemed beyond the grasp of counsel. If this was a statutory fee case, we would reduce the lodestar.

A few examples will suffice. First, counsel filed suit in the wrong court. Second, he sued the wrong defendant. Third, he filed a frivolous motion for equitable relief. Fourth, he filed a second claim against the United States involving the same parties and facts while this case was pending. Fifth, he filed a third claim against the United States on behalf of plaintiffs' children arising out of the operative facts, although Pennsylvania law is to the contrary. Sixth, he urged this court to follow the decision of a county court in Ohio as precedent for overruling Pennsylvania substantive

law, despite the fact that the case has no precedential value. Seventh, he appeared at a pre-trial conference with articles from medical journals and treatises which he proposed to read into evidence. Eighth, he filed notices of depositions in violation of Federal Rule 26 and cited as authority the Pennsylvania Rules of Civil Procedure. And ninth, he failed to file suit in federal court against diverse parties and consolidate those actions with the instant case for trial, once the instant action was removed, to permit adjudication of all claims and prevent the defense of issue preclusion. There is more but further recitation is unnecessary.

We also find that, since counsel failed to include any provision for reimbursement of costs in his offer to

enter an implied contract of employment dated August 3, 1981, we are required to enforce the terms of the bargain he proposed, and deny any claim for costs incurred in representing any member of the Godwin family in this litigation. Our decision is compelled not only by contractual principles but also by the supervisory power of the court to protect clients from unfairness, overreaching and unprofessional conduct by counsel.[9] We believe that denial of costs and expenses is an appropriate sanction for a lawyer who intentionally attempts to extract an illegal fee from a person to whom Congress and the Supreme Court have accorded special consideration. Counsel's claim for costs in the sum of $62,015.19 will be denied.

Finally, plaintiffs expressed concern at a recent conference

concerning the intentions of counsel following the settlement. He has been discharged as their lawyer and therefore this court orders counsel and the law firm to refrain from pressing any claim or demand in any court, Federal or State, against plaintiiffs for any fee, expense or cost unless otherwise authorized by this court.

The civil actions filed by plaintiffs in this and any other court against any defendant shall be marked discontinued with prejudice on motion of any defendant by virtue of the settlement and in accordance with the Stipulation for Compromise Settlement. A written order will follow.

DATED: January 18, 1982

Donald E. Ziegler
United States District Judge

cc: Alton and Karen Godwin
Kenneth W. Behrend, Esquire
Craig R. McKay, Esquire
Carl F. Boyer, Esquire
Wilbur Mccoy Otto, Esquire
George M. Weis, Esquire

FOOTNOTES

1/ Stipulation for Compromise Settlement at paragraph 3.

2/ See Settlement Sheet dated November 16, 1982, which is attached and marked Exhibit A.

3/ See Power of Attorney which is attached and marked as Exhibit B.

4/ The public policy is clear with respect to fees under the Tort Claims Act because Congress has made it a crime to charge a fee in excess of 25%.

5/ A copy of the letter is attached and marked Exhibit C.

6/ See Exhibit A

7/ Id.

8/ See Exhibit C.

9/ DR 2-106(A) Code of Professional Responsibility.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ALTON GODWIN and KAREN GODWIN, his wife,	)	
Plaintiff,	)	
vs.	)	
UNITED STATES OF AMERICA	)	
Defendant and Third-Party Plaintiff	)	Civil Action 81-856
vs.	)	
EYE AND EAR HOSPITAL, DALE McMURDO, FRANK KAISER, HOWARD F. ARMOUR,	)	
Third-Party Defendants	)	

ORDER OF COURT

AND NOW, this 18th day of January, 1983,

IT IS ORDERED that the motion of the United States of America shall and hereby is granted.

IT IS FURTHER ORDERED that the motion of Kenneth W. Behrend, Esquire

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and the law firm of Behrend, Aronson & Morrow for reconsideration of the award of attorney's fees shall be and hereby is denied.

IT IS FURTHER ORDERED that the motion of Kenneth W. Behrend and the law firm of Behrend, Aronson & Morrow for assessment of costs and expenses shall be and hereby is denied.

IT IS FURTHER ORDERED that the motion filed by Kenneth W. Behrend and the law firm of Behrend, Aronson & Morrow on behalf of plaintiffs, after they were discharged as counsel, for indemnification for counsel fees and expenses against the United States shall be and hereby is denied.

IT IS FURTHER ORDERED that Kenneth Behrend and the law firm of Behrend, Aronson & Morrow shall be and hereby are ordered to refrain from pressing any claim or demand in any

court against plaintiffs for any fee, expense or cost unless otherwise authorized by the court.

Donald E. Ziegler
United States District Judge

cc: Counsel of record

APPENDIX F

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ALTON GODWIN and KAREN GODWIN, his wife,	)	
Plaintiff,	)	
vs.	)	Civil Action
UNITED STATES OF AMERICA	)	81-856
Defendant and Third-Party Plaintiff	)	
vs.	)	
EYE AND EAR HOSPITAL, DALE MURDO, FRANK KAISER, HOWARD F. ARMOUR,	)	
Third-Party Defendants	)	

ORDER OF COURT

AND NOW, this 15th day of December, 1982, in accordance with the settlement agreement of the parties in which the United States agreed to pay the sum of $1,125,000.00 plus good and other valuable consideration,

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IT IS ORDERED that the United States shall issue a check payable to Alton Godwin and Karen Godwin, his wife, in the sum for $443,750.00.

IT IS FURTHER ORDERED that the United States shall purchase an annuity for Alton Godwin and Karen Godwin, his wife, in the sum of $400,000.00.

IT IS FURTHER ORDERED that the United States shall issue a separate check payable to Behrend, Aronson and Morrow in the sum of $281,250.00 for services rendered pursuant to 28 U.S.C. Section 2678.

IT IS FURTHER ORDERED that the law firm of Behrend, Aronson and Morrow shall file a motion with supporting affidavits within 30 days relative to any claim they may perceive to exist for recovery of any item in excess of

statutory amount set forth in 28 U.S.C. Section 2678.

IT IS FURTHER ORDERED that the law firm of Behrend, Aronson and Morrow shall file a bill of costs with the Clerk within 30 days relative to any claim they may have against the United States for costs by virtue of the settlement of the claims of plaintiffs.

_____
Donald E. Ziegler
United States District Judge

cc: Kenneth W. Behrend, Esquire
Craig R. McKay, Esquire
Carl F. Boyer, Esquire
Wilbur McCoy Otto, Esquire
George M. Weis, Esquire

Supreme Court, U.S.
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No. 85-1122

In the Supreme Court of the United States

OCTOBER TERM, 1985

KENNETH W. BEHREND AND
BEHREND, ARONSON AND MORROW, PETITIONERS

v.

ALTON GODWIN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Department of Justice
Washington, D.C. 20530
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Petitioners challenge the dismissal of their appeal on res judicata grounds.

1. Petitioners are an attorney and his law firm who were retained by respondents Alton and Karen Godwin[1] to bring an action under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, in connection with a severe injury sustained by Mr. Godwin during surgery in a Veterans Administration (VA) hospital.[2] Against petitioners' advice, the Godwins agreed to a settlement that provided them with a cash payment of $1,125,000 and Mr. Godwin with lifetime medical care at a VA hospital. Pet. App. 3a-4a.[3] Petitioners' fee for

[1] Mr. Godwin is now deceased (Pet. App. 3a).

[2] The action originally was brought in state court. It subsequently was removed to the United States District Court for the Western District of Pennsylvania pursuant to 38 U.S.C. 4116.

[3] The district court found that petitioners' conduct "permits the conclusion that counsel opposed the settlement of the case, not because the offer was unreasonable, but because a large fee was in jeopardy if plaintiffs accepted the offer" (Pet. App. 80a).

their services in obtaining this settlement was limited by statute to 25% of the settlement value. 28 U.S.C. 2678; Pet. App. 4a-5a. Instead of seeking 25% of the cash payment ($281,250), however, petitioners calculated the value of Mr. Godwin's future medical care, added that amount to the cash payment of $1,125,000, and concluded that the total value of the settlement was $2,091,000; they then requested 25% of that sum, or $582,750, as their fee (*id.* at 4a).

Despite petitioners' request, the district court found it appropriate to award a fee of $281,250 based only on the cash value of the settlement.[4] On petitioners' motion for reconsideration, the court reaffirmed its original fee award. Pet. App. 63a-86a. The district court also declined to award costs or expenses to petitioners because they had no contract for reimbursement with the Godwins (*id.* at 84a-85a).[5] And the court, expressing concern about "the intentions of counsel following the settlement" (*id.* at 86a), directed petitioners to refrain from pressing any claim in any court against the Godwins for an additional fee or for reimbursement for the costs of the litigation (*id.* at 4a-5a, 86a).[6]

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[4] The district court explained that this sum was "generous in view of the caliber of representation in this case" (Pet. App. 82a), explaining that "many of the substantive legal concepts, and most of the rules of procedure, seemed beyond the grasp of counsel" (*id.* at 83a). Indeed, the district court stated that "[i]f this was a statutory fee case, we would reduce the lodestar" (*ibid.*).

[5] Alternatively, the district court found that the denial of petitioners' request for fees and costs was an appropriate sanction for their "overreaching and unprofessional conduct" (Pet. App. 85a).

[6] The district judge characterized petitioners' conduct during the course of their representation of the Godwins as the most "egregious example of overreaching by a lawyer" that he had encountered "in 10 years of public service and 22 years at the bar" (Pet. App. 70a).

On appeal, petitioners challenged the district court's ruling setting their fee and denying them costs, although they did not challenge the order that they refrain from pursuing further claims against the Godwins (Pet. App. 5a). The court of appeals affirmed the district court's judgment (*id.* at 16a-62a). It ruled that petitioners were estopped from seeking a larger fee from the Godwins. The court of appeals also held that petitioners were not contractually entitled to recover costs or expenses from the Godwins and that, in any event, their claim for costs had not been preserved because they had failed to file a timely request for reimbursement. *Id.* at 56a-57a. This Court denied petitioners' subsequent petition for a writ of certiorari. No. 84-203 (Oct. 9, 1984).

2. After this Court's denial of certiorari, petitioners filed a motion in district court under Fed. R. Civ. P. 60(b), seeking relief from the court's order prohibiting them from asserting further claims against the Godwins. The motion was denied (Pet. App. 13a-15a).[7]

On petitioners' appeal, the court of appeals again affirmed the dismissal of their claim. The court noted that petitioners' prior appeal had not challenged the order prohibiting them from seeking costs and expenses from the Godwins (Pet. App. 7a, 8a), and held that petitioners "may not now challenge the procedure followed by the district court or the basis for its decision on any grounds that [they] could have, but did not, raise previously" (*id.* at 9a). The court of appeals also explained that its prior deci-

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[7] As the court below noted (Pet. App. 8a), petitioner Behrend also filed individual damages actions arising out of this litigation against the district judge and the Assistant United States Attorney who originally handled the case. *Behrend* v. *Ziegler*, No. 85-17 (W.D. Pa.), appeal pending, No. 85-3495 (3d Cir.); *Behrend* v. *McKay*, No. 85-16 (W.D. Pa.), appeal pending, No. 85-3494 (3d Cir.). These actions were dismissed on immunity grounds by the district court and currently are pending on appeal.

sion had held on the merits that petitioners had failed to preserve their claim against the Godwins for costs or expenses (*id.* at 7a, 10a), so that their "claims for reimbursement from the Godwins have already been litigated before the district court and this court" (*id.* at 10a).

The court of appeals accordingly concluded that "[t]he doctrine of *res judicata* bars further litigation of these same claims" (Pet. App. 10a-11a). In these circumstances, the court of appeals held that the All Writs Act, 28 U.S.C. 1651(a), authorized the district court to prohibit the initiation of meritless suits presenting claims for costs or expenses identical to those that already had been rejected (Pet. App. 6a-7a). Because it found petitioners' claims on appeal entirely frivolous, the court of appeals, citing Fed. R. App. P. 38 and 28 U.S.C. 1912, also ordered petitioners to pay double costs (Pet. App. 11a).

3. Petitioners' claim that they were denied due process when the district court rejected their Rule 60(b) motion without holding a hearing (Pet. 13) is patently frivolous. Both courts below found it obvious that petitioners' attempt to relitigate a claim against their erstwhile clients was barred as a matter of law by res judicata. In these circumstances, the district court was under no obligation to hold a hearing prior to denying petitioners' motion on the papers.

Indeed, petitioners' claim that a due process issue is presented here because they were "fine[d]" (Pet. 14) or "sanction[ed]" (Pet. 15) without advance notice mischaracterizes the course of the proceedings below. The court of appeals' original decision affirming the denial of costs expressly declined to treat the district court's order as a sanction (Pet. App. 54a); instead, it held that petitioners were not contractually entitled to reimbursement and had not, in any event, preserved any claim for costs (*id.* at 56a-57a). Against this background, the district court's order barring further actions against the Godwins for costs or expenses

simply prevented petitioners from seeking a recovery to which they were not entitled on the merits, and served principally to protect the Godwins from petitioners' continuing course of "overreaching and unprofessional conduct" (*id.* at 85a; see *id.* at 70a, 72a-73a, 80a-82a, 85a-86a).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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